

Study H-853

April 20, 2004

Third Supplement to Memorandum 2004-20

**State Oversight of Common Interest Developments
(Discussion of Issues)**

Attached to this supplemental memorandum are comments of Patrick L. McLane relating to common interest development governance, received by the Commission at its April 15, 2004, meeting.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Patrick McLane

From: "Patrick McLane" <plmclane@starstream.net>
To: <asklarry@voteforlarry.com>
Sent: Wednesday, January 28, 2004 3:26 AM
Attach: Due Process Issue.doc; Due Process Issue - Summary.doc
Subject: Re: Issue Update: Due Process issue critical for protection of property rights of lot owners.

Dear Larry:

I have enjoyed following your presentations and commentaries on various issues.

I also completed your Survey 1 poll, but for reasons unknown it did not accept the assigned Validation Number (or any number) and therefore could not be submitted.

If you can tell me how to correct this, I will try again to send it.

I am attaching hereto a 3-page discussion and a 1-page summary of a critical issue described as "NEED FOR 'DUE PROCESS' POLICIES AND PROCEDURES TO PROVIDE FOR AND ASSURE FAIR, HONEST, AND LEGALLY CORRECT RESOLUTION OF ISSUES AFFECTING PROPERTY RIGHTS OF LOT OWNERS." This issue relates to your issues of (1) the lack of an appeal process from Board of Directors' actions, (2) the possible need for governmental regulation to the extent of possibly requiring that HOAs establish policies and procedures requiring "due process," and (3) the adequacy (and in this particular area the gross inadequacy) of the CC&Rs, By-Laws, Rules and Regulations. The main discussion takes three pages because I believe that the setup is necessary to put the situation in meaningful context and perspective. The summary constitutes a more general statement of the issue.

The issue is absolutely basic to proper governance by the association and is potentially critical to any lot owner whose attempt to exercise his/her legal property rights is contested by the HOA or by any committee (primarily an incompetent and/or dishonest Architectural Review Committee) or hired administrator on its behalf. I believe that my commentaries are essentially self-explanatory, but I will welcome any questions you may have to assist in understanding and dealing with the issue.

Although the innuendo and references to situations and mishandling may seem to be extreme and/or improbable, they specifically reflect our treatment and experience in connection with our rejected application for approval of a backyard cottage, and are neither hypothetical nor overstated. The strong implication/assertion, in effect, that we are 100% correct on the law (i.e. in our legal interpretation and conclusions) is based on my thorough analysis and evaluation (as an attorney with 42 years of experience in real estate matters and document interpretation) of the facts, the pertinent law, and all pertinent documents. Also, my analysis and conclusions have been confirmed by each of the several attorneys with whom I have consulted in connection with our situation.

Our legal evaluation is not a "matter of opinion," nor does it involve any issues properly within the "discretion" of the ARC or the HOA, although it is inevitable that the persons involved in this gross miscarriage of justice will make both claims and invent whatever other denials and excuses they can think of in order to defend themselves and rationalize their behaviour. If any of them will step into the open to assert their denials and/or excuses, I would welcome the opportunity to contribute to their education.

When you get a chance, your consideration of and comment on this issue will be appreciated. In the meantime, thank you for your interest, and continuing good luck with what I hope will be a successful campaign.

Very best regards,

Pat McLane

1/28/2004

Patrick McLane

From: "Patrick McLane" <plmclane@starstream.net>
To: "Denny and Shelah Valentine" <sdvalentine@aol.com>
Cc: "Charlotte Fisher" <ddec@aol.com>; "Charlotte and Mike Anderson" <charlottewanderson@yahoo.com>
Sent: Tuesday, January 13, 2004 9:40 PM
Attach: Due Process Issue.doc
Subject: Issue: Need for Due Process in Decision-Making Affecting Property Rights of Lot Owners

Dear Denny:

Attached hereto is the third draft (Mike and Charlotte have seen the first two) of my issues statement on the above matter. The innuendo and examples relate to our specific case with the cottage, and are not hypothetical. However, as the need for corrective action applies to any and all future cases involving disputed property rights of lot owners, and as specific reference to our mistreatment at the hands of the system would detract from the general points that are being made, it is best not to cite or identify our particular case (although the powers-that-be will, of course, have no problem knowing what we are talking about). The strong implication/assertion, in effect, that we are 100% right on the law (i.e. our legal interpretation) is based on my conviction as a real estate attorney with 42 years of experience and highly developed (and recognized) skills in document drafting and interpretation, and on the opinion of all of the attorneys that I have consulted with on our matter. Our evaluation is not "a matter of opinion," nor does it involve any issues properly within the "discretion" of the ARC or the HOA, although it is inevitable that the guilty parties whose oxes are gored will make both claims and invent whatever other denials and excuses they can think of.

The dissertation takes three pages because I believe that the setup is necessary to put the situation in meaningful context and perspective. I also have an occupational bias towards being comprehensive which severely detracts from any latent ability that I may have to be "short and simple." However, this doesn't mean that we can't do some editing to make the piece more acceptable for some kind of publication. Please let me know what you think and what you suggest. I will ask Mike and Charlotte to do the same.

Your interest in this issue is greatly appreciated by both of us.

Mahalo,

Pat McLane

SUMMARY OF ISSUE REQUIRING BOARD OF DIRECTORS ACTION:

NEED FOR "DUE PROCESS" POLICIES AND PROCEDURES TO PROVIDE FOR AND ASSURE FAIR, HONEST, AND LEGALLY CORRECT RESOLUTION OF ISSUES AFFECTING PROPERTY RIGHTS OF LOT OWNERS

The Governing Documents create a government-like structure (administered through the Homeowner's Association [HOA], its Board of Directors, committees, and hired administrators) which serves to govern the rights, duties, and activities of all lot owners (residents) with respect to matters with which such documents deal, including especially the use and further development of individually owned lots.

A major and critical problem with this private government-like structure and its operation is that no provision has been made in the governing documents or otherwise to assure that "due process" will be afforded to resident lot owners who have disputes with the HOA. The limited general procedures that do exist do not assure that disputes will be processed in a fair and legally correct manner. The system works fairly and correctly only if the people charged with administering it act voluntarily in ways that effectively provide due process. Unfortunately, such righteous conduct cannot be assumed, and in certain significant cases has not occurred, thereby wrongfully depriving lot owners of important property rights. [Please see the full commentary on this issue for an understanding of the kind of egregious and unconscionable abuses that can occur and have in fact occurred.]

In dealing with lot owners in matters affecting their property rights, the HOA and the Board of Directors, committees, and hired administrators should be concerned with achieving fair and legally correct results, not with indulging the private agendas, prejudices, or preferences of individuals in positions of arbitrary power.

In order (1) to promote and achieve the just and legally correct decision-making to which all lot owners are entitled, (2) to assure that such owners are not deprived of their basic property rights without due process, and (3) to protect Sun City Lincoln Hills and the HOA (and all persons acting on its behalf) from damage claims by deprived lot owners and the adverse public attention, negative reputation, and reduction in property values that are a likely by-product of the callous mishandling of legal disputes with lot owners, it is necessary that policies and procedures be adopted by the Board of Directors to assure the fair, honest, and legally correct resolution of issues affecting the property rights of lot owners.

To provide for both procedural and substantive due process and mitigate the serious abuses that can occur (and have occurred) under the present system, policies and procedures need to be developed to require full disclosure of the HOA's legal opinions and of how they are obtained. Also, if the HOA and the lot owner cannot agree on the proper resolution of legal issues after such issues have been fully vetted, there needs to be provision for alternative dispute resolution with the help of some legally competent, independent, and mutually agreed upon third party (or parties).

NEED FOR "DUE PROCESS" POLICIES AND PROCEDURES TO PROVIDE FOR AND ASSURE FAIR, HONEST, AND LEGALLY CORRECT RESOLUTION OF ISSUES AFFECTING PROPERTY RIGHTS OF LOT OWNERS

The Covenants, Conditions, and Restrictions (CC&Rs), and the related By-Laws, Design Guidelines, and Rules and Regulations applicable to SCLH (referred to collectively in the CC&Rs as the Governing Documents) create a government-like structure (administered through the Homeowner's Association [HOA], its Board of Directors, committees, and hired administrators) which serves to govern the rights, duties, and activities of all lot owners (residents) with respect to matters with which such documents deal, including especially the use and development of individual lots. Also, as part of the overall scheme of things, the City of Lincoln has adopted and administers compliance with Del Webb's General Development Plan (which takes precedence over conflicting aspects of its own ordinances respecting similar subject matter) and will not grant building permits to lot owners without the specific written approval of the HOA's Architectural Review Committee (ARC).

In effect, local government has ceded essential elements of its authority to the HOA and, indirectly, to the persons performing functions on behalf of the HOA, and resident lot owners have, by signing contracts of adhesion required by Del Webb as a condition of purchase, subjected themselves to a very comprehensive body of rules that takes precedence over governmental regulations, includes matters that go beyond the normal scope of governmental regulation, and is enforced primarily by the HOA rather than by any governmental authority.

If these rights and powers were retained by the government, the procedures for their application and enforcement would be specifically established by laws, ordinances, rules and regulations (all duly adopted in a democratic manner), all of which would have to comply with the applicable requirements of the Constitutions of the State of California and the United States of America. The enforcement of such laws, etc. would be subject to the procedural requirements and safeguards of an Administrative Procedures Act, and/or whatever courts or other authorities might have jurisdiction (pursuant to established Rules of Court, Rules of Civil Procedure, Rules of Arbitration, etc.), all intended and designed to provide the "due process" for all participants required by both the California and federal Constitutions, and thereby to yield fair and legally correct decisions and outcomes.

A major and critical problem with the ceding of legal powers to the HOA is that no provision has been made to assure that "due process" will be afforded to resident lot owners who have disputes with the HOA. Procedures for dispute resolution are non-existent, inadequate, and/or unfair, and do not assure that disputes will be processed in a fair, honest, and legally correct manner. The system as it presently exists can work acceptably only if the people in positions of highly arbitrary (and therefore readily abusable) power are properly motivated and dedicated to act voluntarily in ways that effectively provide due process. Unfortunately, such righteous conduct cannot be assumed, and in certain significant cases has not occurred, thereby wrongfully depriving lot owners of important property rights.

The situation is aggravated by the fact that the interpretation and application/enforcement of legal documents (which is essentially what all issues in this area are about) are generally beyond the capabilities of persons who are not trained, qualified, or experienced in the law, even sometimes in the simplest of cases.

The present system permits, enables, and tolerates (1) the total ignoring of a lot owner's conclusively valid legal arguments, (2) HOA "reliance" on bogus, erroneous, and unresponsive "legal opinions" allegedly issued by the HOA's attorney but not directly provided to the lot owner, (3) decisions on the issues by the very people and entities opposing the lot owner (the HOA having the power to judge its own case and rule in its favor even without having at least to participate fairly and honestly in a proper vetting of the legal issues in dispute), and (4) no further recourse short of expensive litigation which would not be necessary if the system had operated in a fair and legally appropriate manner in the first place.

In connection with item (2) above, it is an absolute absurdity to claim that the HOA's attorney's "legal opinion" upon which the HOA bases its position in opposition to the thoroughly stated and explained legal position of the lot owner is "confidential", or a "privileged communication," and is therefore not disclosable to the lot owner. This is the equivalent of having a court rule against a litigant on the basis of a memorandum by the opposing party that is kept secret from such litigant.

In view of the foregoing, in order (1) to promote and achieve the just and legally correct decision-making to which all lot owners are entitled, (2) to assure that such owners are not deprived of their basic property rights without due process, and (3) to protect Sun City Lincoln Hills and the HOA (and all persons acting on its behalf) from damage claims by deprived lot owners and the adverse public attention, negative reputation, and reduction in property values that are a likely by-product of the callous mishandling of legal disputes with lot owners, it is necessary that policies and procedures be adopted by the Board of Directors to assure the fair, honest, and legally correct resolution of issues affecting the property rights of lot owners.

To achieve this objective and mitigate the serious abuses that can occur (and have occurred) under the present system, policies and procedures need to be developed to require that whenever a legal issue is raised where the resident lot owner and the HOA do not agree, each side must present its legal arguments and authorities in writing. All HOA requests for legal opinions should be required to be made in writing, furnishing the lot owner with a copy of the HOA's written request for its attorney's opinion, in order to assure that the issues have been fairly and accurately presented to the attorney. This should prevent the abuse of obtaining a desired answer/opinion from a cooperating attorney by misstating the problem, the issues, or the facts, or by failing to provide the HOA's attorney with actual copies of the legal arguments and explanations provided by the lot owner and requiring specific and detailed response and refutation by the HOA's attorney. In essence, there needs to be full disclosure of the HOA's legal opinions and of how they are obtained.

If the HOA and the lot owner cannot agree on the proper resolution of legal issues after such issues have been fully vetted, there needs to be provision for alternative dispute resolution with the help of some legally competent, independent, and mutually agreed upon third party (or parties). An example of a procedure for resolving disputes would be to require mediation, followed by arbitration if the mediation is not successful. Such arbitration would be non-binding unless the parties mutually agree that it will be binding. Requiring such procedures should tend to promote fair and correct resolution at an earlier stage.

(The requirements of California Civil Code Section 1354, recognized in CC&R Section 13.08, requiring a Request for [Alternative Dispute] Resolution [which may be refused by the HOA] prior to bringing a civil action, apply after the damage resulting from the lack of established procedures intended to assure lot owners "due process" has already occurred, and do not do anything to promote or assure due process in the decision-making process practiced and controlled by the HOA and its committees and hired administrators in the course of considering and deciding issues involving the legal rights of lot owners in the use of their property.)

Most importantly, in dealing with lot owners in matters affecting their property rights, the HOA and the Board of Directors, committees, and hired administrators should be concerned with achieving fair and legally correct results, fully recognizing and acknowledging the property rights of lot owners, not with indulging private agendas, prejudices, or preferences in the exercise of their arbitrary power and responsibility under the self-righteous guise of "enforcing the CC&Rs."

Each candidate for the Board of Directors should be asked to recognize the need for effective corrective measures to provide procedural and substantive due process in disputes with resident lot owners, and to agree to insist that appropriate and legally adequate procedures be developed, adopted, and followed by the Board of Directors, its committees, and hired administrators. A candidate who is not serious about this most basic and important issue may claim that it is enough to rely on the fairness and competence of the individuals involved, but the workings of the present system (as noted in the preceding paragraphs) have demonstrated the fallacy of any such argument or assumptions. Similarly, such a reluctant candidate may claim that the situation can be remedied only by amending the CC&Rs or by adopting new Operating Rules pursuant to the requirements of newly enacted (effective January 1, 2004) Assembly Bill No. 512, knowing that as a practical matter the legally required procedures for taking any such action(s) would significantly delay the achieving of the needed policies and procedures. The answer, to meet the immediate need for fairness in the decision-making process, without any amendment to the CC&Rs, and pending the formal adoption of appropriate Operating Rules, is that there appears to be no reason that policies and procedures can't be presently developed, adopted, and implemented to accomplish the desired objectives. This all should be done as soon as possible, with the aid of competent attorneys, perhaps utilizing the services of experienced attorneys within the community who would be willing to assist the Board of Directors in this most important endeavor.